



IT IS ORDERED as set forth below:

Date: December 22, 2011

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: 11-43035-PWB
	:	
MATTHEW CLAY SANFORD,	:	
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
	:	
	:	
HENSLER & BEAVERS GENERAL	:	
CONTRACTORS, INC.,	:	
	:	
Plaintiff	:	
	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 11-4063
MATTHEW CLAY SANFORD,	:	
	:	
	:	
Defendant.	:	

ORDER DENYING MOTION TO DISMISS

Hensler & Beavers General Contractors, Inc., (the “Plaintiff”) seeks a determination that its debt is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). The Debtor seeks

dismissal of this action on the grounds that the Plaintiff's complaint fails to state a claim upon which relief may be granted because (1) the Plaintiff is not a creditor of the Debtor; (2) the complaint does not state a claim under § 523(a)(2)(A); and (3) the Plaintiff may not recover attorney's fees in a dischargeability action. For the reasons set forth herein, the motion is denied.

The Debtor is the President and owner of Sanford Land Development, Inc. ("Subcontractor"). The Plaintiff is a general contractor who entered into a subcontract with Subcontractor for work to be done for a building project at Pine Mountain Middle School.

The Plaintiff alleges that during the course of the project, Subcontractor ordered materials from Ferguson Waterworks and B&B Precast & Pipe, LLC, for work on the project. The Plaintiff alleges that Subcontractor submitted applications for payment to the Plaintiff for, among other things, materials purchased from these suppliers. The Plaintiff alleges that in the applications for payment the Debtor falsely swore under oath that the suppliers had been paid for the ordered materials and that he knowingly made such false representations with the intent to induce the Plaintiff to make payment. (Complaint, ¶¶ 9, 14-15). The Plaintiff contends that the suppliers were not paid and, as a result, the Plaintiff suffered damages.

The Debtor seeks dismissal of this action for three reasons. First, the Debtor contends that the Plaintiff is not a creditor and, therefore, lacks standing to pursue this action. Second, the Debtor contends that the complaint fails to set forth facts to satisfy the pleading standards of Rules 8 and 9 of the Federal Rules of Civil Procedure. Third, the Debtor contends that the Plaintiff is not entitled to attorney's fees as requested in Count II of the Complaint. The Court will consider each argument in turn.

The Debtor's liability to the Plaintiff

The Debtor contends that because the transactions were between the Plaintiff and Subcontractor and the Debtor acted only in his capacity as Subcontractor's president in signing documents, the Plaintiff is not a creditor of the debtor. Essentially, the Debtor argues that if the Plaintiff is not a creditor, then there is no "debt" to be excepted from discharge. Viewed strictly as a matter of contract (i.e., the contract between the Plaintiff and the Subcontractor), this is correct. The Plaintiff does not allege that the Debtor personally guaranteed or is otherwise contractually obligated on any debt to the Plaintiff.

But consideration of whether the Debtor owes a debt to the Plaintiff goes beyond the actual contract. A "debt" is "liability on a claim." 11 U.S.C. § 101(12). A claim is broadly defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 101(5)(A). To the extent the Debtor personally made an intentional fraudulent statement calculated to cause the Plaintiff to make payment, the Plaintiff has a claim in tort, not contract, against the Debtor personally. Thus, the fact that the contractual relationship is between the Debtor and Subcontractor is not solely determinative and does not serve as a basis for dismissal of the complaint.

The § 523(a)(2)(A) claim

Section 523(a)(2)(A) provides that a discharge under chapter 7 does not discharge a debtor from a debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud."

A "false pretense" is an "implied misrepresentation or conduct which creates and fosters

a false impression.” *In re Antonious*, 358 B.R. 172, 182 (Bankr. E.D. Pa. 2006) (citations omitted). Events that “create a contrived and misleading understanding of a transaction in which a creditor is wrongly induced to extend money or property to the debtor” may constitute false pretenses. *Id.* A false representation is one in which there is an *express* misrepresentation of fact. *E.g., Carlan v. Dover (In re Dover)*, 185 B.R. 85, 88 n.3 (Bankr. N.D. Ga. 1995). Finally, “actual fraud” is a much broader term than false pretenses or false representation and may encompass “deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another.” *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (citation omitted).

To survive a motion to dismiss under Rule 12(b)(6), a complaint “does not need detailed factual allegations,” but those allegations “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim must have “facial plausibility,” which is met “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

The Court concludes that the Plaintiff’s complaint states a claim for relief under § 523(a)(2)(A). The common element to false pretenses, false representation, and actual fraud is an intent to deceive by the debtor. The Plaintiff alleges: “In the Applications for Payment, the Debtor, individually, falsely swore under oath that the aforementioned suppliers had been paid for the ordered materials.” (Complaint, ¶ 9); “The Debtor obtained money by false pretenses and/or false representations, as evidenced by providing [the Plaintiff] with sworn to Applications for Payment that he knew to be false at the time such representations and statements were made to

him” (§ 14); and “The Debtor knowingly provided the false Applications for Payment to induce [the Plaintiff] to advance monies to the Debtor.” (§ 15).

The statements in paragraphs 9, 14, and 15 of the complaint are factual assertions, not mere legal conclusions. “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 129 S.Ct. at 1950. Such claims satisfy the “facial plausibility” test because they are factual assertions as to who acted (the Debtor), the act that was deceptive (the signing of the applications for payments that the debtor knew to be false with the intent to induce payment), and how the Plaintiff was damaged (the payment of funds).¹ These allegations, taken with the other factual allegations in the Complaint, also satisfy the pleading requirements of Rule 9 of the Federal Rules of Civil Procedure. The Complaint’s factual allegations sufficiently identify the circumstances constituting the alleged fraud to permit the Debtor to respond in his answer.

The claim for attorney’s fees

Count II of the Plaintiff’s complaint seeks attorney’s fees pursuant to O.C.G.A. § 13-6-11.² The Debtor contends that a creditor has no entitlement to attorney’s fees under § 523(a)(2)(A).

A party who prevails on an intentional tort claim may recover attorney’s fees under

¹The Plaintiff’s allegations that the Debtor violated O.C.G.A. §§ 16-8-15 and 16-10-71, which are criminal statutes, are not the correct focus. The issues are whether the Debtor knowingly and intentionally deceived the Plaintiff by his actions and whether the Plaintiff suffered damages as a result.

²O.C.G.A. § 13-6-11 provides, “The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.”

O.C.G.A. § 13-6-11 as an additional element of damages. To the extent the Plaintiff prevails on its § 523(a)(2)(A) claim and can establish circumstances that § 13-6-11 specifies, the Plaintiff may recover attorney's fees. *In re Porter*, 2007 WL 7141821 (Bankr. N.D. Ga. 2007) (Bonapfel, J.). As a result, the Debtor's motion to dismiss Count II is denied.

For the foregoing reasons, the Court concludes that the Plaintiff's complaint states a claim upon which relief may be granted. Accordingly, it is

ORDERED that the Debtor's motion to dismiss is denied.

End of Order

Distribution List

Terry Haygood
Law Offices of Terry Haygood
401 Broad Street, Ste. 102
Rome, GA 30161

Will B. Geer
Stites & Harbison, PLLC
303 Peachtree Street NE
2800 Suntrust Plaza
Atlanta, GA 30308